

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 40953

SIPCO, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF F.P. CORP.

Decided: June 6, 1997

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Northern District of Iowa, Western Division, in *F.P. Corp. v. SIPCO, Inc.*, Civ. No. C91-4083. The court proceeding was instituted by F.P. Corp. (F.P.), a former motor common and contract carrier, to collect undercharges from SIPCO, Inc. (SIPCO or petitioner).² F.P. seeks undercharges of \$23,071.20, plus interest of \$4,644.57, allegedly due, in addition to amounts previously paid, for the transportation of 93 shipments of meat and frozen products between August 9, 1988, and February 11, 1989. The shipments were transported from distribution and cold storage facilities located in Des Moines, IA, to points throughout the United States. By order dated March 12, 1993, the court stayed the proceeding for the purpose of enabling petitioner to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court order, petitioner, on March 17, 1993, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, contract carriage, rate reasonableness, and unreasonable practice. By decision served March 30, 1993, the ICC established a procedural schedule. Petitioner filed its opening statement on June 1, 1993. Respondent filed its response on June 28, 1993. Petitioner submitted its rebuttal on July 20, 1993.

SIPCO in its opening statement asserts that the subject shipments were transported by F.P. under its contract carrier permit pursuant to a written agreement; that the filed rate providing the basis for respondent's undercharge claims is dependent upon a mileage guide in which respondent was not a participant during the period when the subject shipments were transported and is thus invalid as a matter of law; and that the common carrier rates that F.P. seeks to impose are unreasonable.

Petitioner supports its argument with a verified statement from Mr. David J. Polreis, Vice President-Traffic of Monfort, Inc. (Monfort), a subsidiary of ConAgra, Inc. (ConAgra). Mr. Polreis

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

² SIPCO operated under the trade name Swift Independent Packing Company (Swift).

asserts that SIPCO was acquired by ConAgra 1987, and that thereafter SIPCO's meat packing plant and distribution facilities located in Des Moines, IA were placed under the jurisdiction of Monfort. Mr. Polreis states that during the period in which the subject movements took place, he was responsible for arranging all inbound and outbound transportation service at plants operated by Monfort and its various affiliates, including the SIPCO movements from Des Moines. He explains that the SIPCO movements were transported from SIPCO's plant in Des Moines or from Millard Refrigerated Services (Millard), a cold storage facility in Des Moines where SIPCO stored merchandise to be shipped.

Attached to Mr. Polreis' statement is an executed agreement dated August 19, 1988, bearing the signatures of representatives of F.P. and Monfort entitled "Motor Transportation Contract" (Exhibit B). The agreement includes rate schedules³ and indicates that transportation services are to be performed by F.P. under its contract carrier permit No. MC-165653 (Sub-No. 3). Mr. Polreis states that the agreement "contain[s] the rates pursuant to which we agreed that F.P. Corp. would transport our shipments to and from various locations, including Des Moines" and maintains that the agreement includes service from the "the new facilities that had been acquired as part of the SIPCO acquisition."

Attached as Exhibit C to Mr. Polreis' statement are copies of the correction notices issued by F.P. for 91 of the 93 shipments subject to this proceeding.⁴ Each correction notice contains a copy of the original freight bill as well as the "corrected" balance due amounts. They identify the shipper as either Swift or Millard and indicate that the charges were billed to Swift. According to Mr. Polreis, the correction notices reflect the fact that the originally billed charges were assessed by F.P. and paid by petitioner in conformity with the terms of the agreement.

F.P. concedes that it entered into an agreement with Monfort to provide motor contract carrier service to Monfort, but contends that SIPCO is a separate legal entity to which the contractual agreement does not apply. It maintains that a common carrier tariff filed with the ICC that is applicable to the subject shipments does exist and that petitioner has failed to establish that its applicable filed rate is unreasonable.

On December 3, 1993, the NRA became law. The NRA substantially restored the ability of the ICC (and now the Board) to find that assessment of undercharges is an unreasonable practice, and it provided several new grounds on which shippers may defend against payment of undercharges.⁵ By decision served January 6, 1994, the ICC established a procedural schedule permitting the parties to invoke the alternative procedure under the section 2(e) of the NRA and to submit new evidence in light of the new law.

On March 11, 1994, SIPCO submitted a supplemental statement asserting that, based on its previously submitted evidence, it is entitled to relief from respondent's efforts to collect undercharges pursuant to the provisions of section 2(e) of the NRA. F.P. did not submit a response to the supplementary statement.

DISCUSSION

³ Attached to the agreement are various rate schedules. One of the schedule set forth in Appendix II provides a territorial mileage scale of rates in cents-per-mile for boxed meat products from Des Moines to destinations throughout the United States.

⁴ Mr. Polreis states that the correction notices had been obtained from F.P. in response to a document request in the court proceeding. Although he indicates that correction notices for three identified shipments had not been provided by respondent, the record in this proceeding does contain the correction notice for one of the assertedly missing notices (pro number 26259), which was submitted along with 90 other correction notices.

⁵ The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in *Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990).

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."⁶

It is undisputed that F.P. is no longer an operating carrier.⁷ Accordingly, we may proceed to determine whether F.P.'s attempt to collect undercharges (the difference between applicable rate and the negotiated rate) would be an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate.

Here, the record contains a 1988 agreement signed by the parties confirming the existence of a negotiated rate. In addition, petitioner has submitted correction notices for 91 of the 93 shipments subject to this proceeding indicating that the original freight bills issued by respondent consistently applied rates that reflected the freight charges called for in the 1988 agreement. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*). See *William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the rates originally billed by the carrier and paid by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier and the rates set forth in the 1988 agreement confirm the testimony of Mr. Polreis and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered by F.P.; that SIPCO tendered freight to F.P. in reliance on the negotiated rate; that the negotiated rate was billed and

⁶ Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act, as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

⁷ Board records confirm that F.P. held common carrier authority under certificates No. MC-165653 and (Sub-Nos. 1, and 2), and contract carrier authority under permit No. MC-165653 (Sub-No. 3), and that all of F.P.'s motor carrier operating rights were revoked on September 21, 1990.

collected by F.P.; and that F.P. now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for F.P. to attempt to collect undercharges from SIPCO for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on its service date.
3. A copy of this decision will be mailed to:

The Honorable Donald E. O'Brien
Chief Judge
United States District Court for the
Northern District of Iowa
Box 267
Sioux City, IA 51102

P.O.

Re: Case No. C91-4083

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary